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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/692,063	10/23/2003	David F. Davenport	03880-P0002B	7269
24126 7590 11/15/2011 ST. ONGE STEWARD JOHNSTON & REENS, LLC 986 BEDFORD STREET STAMFORD, CT 06905-5619			EXAMINER ARNOLD, ERNST V	
			ART UNIT	PAPER NUMBER
			1613	
			MAIL DATE	DELIVERY MODE
			11/15/2011	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b><i>Advisory Action Before the Filing of an Appeal Brief</i></b>	<b>Application No.</b> 10/692,063	<b>Applicant(s)</b> DAVENPORT ET AL.
	<b>Examiner</b> ERNST ARNOLD	<b>Art Unit</b> 1613

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 07 November 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.
- b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
- Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ They raise the issue of new matter (see NOTE below);
- (c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
- The status of the claim(s) is (or will be) as follows:
- Claim(s) allowed: \_\_\_\_\_.
- Claim(s) objected to: \_\_\_\_\_.
- Claim(s) rejected: 25,27-38,40-48,50,52 and 53.
- Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☒ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
- 1) Applicant's affidavit filed under 37 CRF 1.132 is insufficient to overcome the rejections of record for the following reasons. i) The affidavit clearly states in paragraphs 8 and 18 that the composition used to treat the horses comprised more than just whey powder and lactase. However, the claims do not recite these required elements as there is no evidence that just whey and lactase will, for example, decrease the serum triglyceride concentration to within a normal range but rather a specific combination of components achieves this result. As a consequence, the claims are not commensurate in scope with the showing. ii) The affidavit compares the results to "common knowledge" but fails to provide a citation for the "common knowledge" for the Examiner to assess properly. It is at least not common knowledge to the Examiner. Furthermore, would such a combination work on all mammals rather than just horses as different mammals have different energy needs and the Affidavit only discusses horses. Would the same composition work on a mouse or whale? Applicant asserts that it is not obvious to add whey powders to horses that should avoid high protein feeds. Respectfully, this argument is not persuasive as horses need protein and instant claim 53 only requires about 2 to about 2.5% fat in the composition and an indeterminant amount of protein component which could be anything less than about 97.5% of the total weight of the composition. Thus, the instant claims include very small and very large amounts of protein because the total amount of protein is not defined. The reference which teaches 'avoiding high protein feeds' does not mean to avoid protein altogether and in fact the reference suggests feeding late-cut hay which is lower in protein. The reference still teaches feeding the horses protein; just not as much. With respect to the addition of lactase to whey, the Examiner's position remains that it is obvious to combine these ingredients for the reasons of record. Respectfully, the clinical data does not overcome the prima facie case established by the Examiner for the reasons discussed above. Respectfully, the claims remain rejected at this time and the amendment and affidavit are not entered.

12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_

13. ☐ Other: \_\_\_\_\_

	/Ernst V Arnold/ Primary Examiner, Art Unit 1613
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